



The MRT-RRT Monthly Decisions Bulletin

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This bulletin covers recently published decisions of the Migration Review Tribunal and the Refugee Review Tribunal. The decisions summarised represent a cross-section of published decisions of the Tribunals. Selected summaries of Court judgments, of interest to the Tribunals, are also included. For your reference, 'the Act' refers to the *Migration Act* 1958 and 'the Regulations' refer to the Migration Regulations 1994.

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MIGRATION REVIEW TRIBUNAL DECISIONS

Business and Skilled visas

0802333

26 May 2009, Sydney

Mr D O'Brien, Principal Member

TEMPORARY BUSINESS ENTRY (CLASS UC) – SUBCLASS 457 (BUSINESS (LONG STAY)) – CL.457.223(4)(e) – SKILLS – A delegate of the Minister refused to grant the applicant a Subclass 457 visa on the basis that he did not satisfy cl.457.223(4)(e) of the Regulations as he did not demonstrate he had the skills necessary to perform the nominated activity of cook. A Departmental site visit revealed that several employees at the restaurant where the visa applicant worked did not recognise him and there were discrepancies about who was responsible for the purchase of food items. The visa applicant conducted a cooking demonstration during the site visit and the Departmental officers considered he moved slowly, he had difficulty lighting the wok, he spilt some food and that his uniform was immaculately white. The review applicant, who is the director of a noodle and sushi business, claimed that it was not surprising that employees could not recognise the visa applicant because in such a large enterprise the kitchen staff remained separate from other staff and used a separate entrance. Also, a large restaurant would have its own food procurement department and it may not be uncommon for the head chef to make suggestions about purchases. The visa applicant claimed that he was nervous during the cooking demonstration because it came at the end of a long interview and his uniform was white because it was the start of his working day. The review applicant claimed that she was unsuccessful in retaining a long term cook and that the manager of the restaurant next door helped her during busy periods. She claimed that for the business to further develop, she needed a Chinese style cook long term. The review applicant stated that the visa applicant's qualifications were of a high level for a cook and she did not want a chef who might be expected to have higher level qualifications. She proposed that the visa applicant would principally be the stir fry noodles and rice cook. A DVD was provided showing the visa applicant cooking on his wok, slicing food, adjusting heat controls for his large wok and handling the wok.

Held: Decision under review set aside

The Tribunal accepted the evidence from the review applicant that the visa applicant's qualifications were appropriate for a cook and a higher qualification was not necessary for someone who was a cook rather than a chef and that the visa applicant demonstrated the skills necessary to perform the tasks of a cook. The Tribunal was satisfied from its viewing of the DVD that the visa applicant handled cutting implements with skill and that he cooked in a wok with the expertise normally expected in Chinese style cooking. The Tribunal was somewhat mystified as to why the delegate placed very little weight on this evidence. The Tribunal was also satisfied with the explanation for the blemishes exhibited by the visa applicant during the cooking demonstration and was further satisfied with explanations given for the other matters which had concerned the Department. Accordingly, the Tribunal found the visa applicant met the criteria in cl.457.223(4)(e) of the Regulations for the grant of a Subclass 457 visa.

0802382

15 June 2009, Sydney

Dr I O'Connell, Senior Member

SKILLED INDEPENDENT OVERSEAS STUDENT (RESIDENCE) (CLASS DD) – SUBCLASS 880 (SKILLED – INDEPENDENT OVERSEAS STUDENT) – CL.880.225 – PUBLIC INTEREST CRITERION 4001 – CHARACTER TEST – A delegate of the Minister refused to grant the applicant a Subclass 880 visa on the basis that she did not satisfy cl.880.225 of the Regulations as she had not satisfied Public Interest Criterion (PIC) 4001. The delegate found that the applicant did not satisfy PIC 4001 because she failed to provide the Department with a Canadian Penal Check in respect to her stay in Canada from 1996-2002. The applicant had provided to the Department a Police Clearance Certificate from the Australian Federal Police (AFP), documentation of the award of her Bachelor of Veterinary Science, a copy of an IELTS test with an Overall Band Score of 8.5, documentation indicating she had undergone the required health checks and a letter from the Australasian Veterinary Boards Council indicating that her qualifications had been assessed as

suitable for migration purposes in her nominated profession of veterinary science. In support of her application for review, the applicant provided the Tribunal with a copy of her Canadian Penal check. She also provided evidence of having made a capital investment of \$100,000 in a designated security in order to be awarded 5 bonus points under Part 8 of Schedule 6A to the Regulations.

Held: Decision under review set aside

On the basis of the AFP check and the Canadian Penal check, the Tribunal was satisfied that there was nothing to indicate that the applicant would fail to satisfy the Minister that she passed the character tests. Accordingly, the Tribunal found that the applicant satisfied PIC 4001(b) for the purpose of cl.880.225 of the Regulations. The Tribunal decided to proceed to make the points test assessment in reviewing the application. The Tribunal found that the applicant achieved the pool mark and the qualifying score to pass the points test and thus, that the applicant met cl.880.222. The Tribunal further found that the visa applicant had 'vocational English' as defined in r.1.15B(3) as it was satisfied that she had achieved a score of at least 5 for each of the 4 test components of speaking, reading, writing and listening in a test conducted not more than 12 months before the day on which the visa application was lodged or during the processing of the application. The Tribunal therefore found that the applicant satisfied the requirements of cl.880.222, cl.880.223 and PIC 4001 of cl.880.225 of the Regulations.

Partner and Family Visas

0804599

3 June 2009, Sydney

Ms M Foster, Member

PARTNER (PROVISIONAL) (CLASS UF) – SUBCLASS 309 (SPOUSE (PROVISIONAL)) – CL. 309.311 – MEMBER OF THE FAMILY UNIT – A delegate of the Minister refused to grant the applicants Subclass 309 visas because they did not satisfy cl.309.311 of the Regulations as they were not found to be dependents of the primary visa applicant and the review applicant. The delegate believed that the visa applicants had provided false and misleading evidence to the Department that their parents were deceased. The primary visa applicant claimed that she, her son and the 3 secondary visa applicants were born in Afghanistan but were residing in Pakistan. The primary visa applicant claimed that she and the review applicant are cousins and that they married when the primary visa applicant was about 16 years old in 1997. They lived together in the review applicant's family home and had a son in 2000. The review applicant fled Afghanistan in 2001 for his safety due to the Taliban and other political parties making their local area unsafe. He left without the primary visa applicant and their son as he did not have enough money to bring them with him. They subsequently lost contact. They claimed that the review applicant's parents, 2 sisters and a brother were killed after the review applicant left Afghanistan. The primary visa applicant claimed that she took over responsibility and care of the review applicant's 3 surviving brothers, the visa applicants. The review applicant claimed that he located and re-established contact with his wife, son and brothers after being held in immigration detention for 3 years and that the primary visa applicant informed him of the deaths of his parents and siblings. He claimed that he then commenced sending money to them to meet their basic needs and that he told the primary visa applicant to stop working and ensured that the visa applicants attended school. The applicants submitted Afghan documentation confirming the death of the visa applicants' parents.

Held: Decision under review set aside

The Tribunal found that the review applicant and primary visa applicant met the requirements of r.1.15A for a de facto relationship and that the primary visa applicant was the review applicant's spouse at the time of decision. The Tribunal was unable to obtain information about the procedures by which Afghan documents were authenticated in Pakistan and information before it indicated that assessments made by Afghan embassy and consulate officials in Pakistan as to the authenticity of Afghan documents were not reliable. In light of this, the Tribunal concluded that the statements attesting that the visa applicants' parents had been killed were genuine and that they had died as claimed. It also found that the primary visa applicant and the review applicant were credible witnesses. The Tribunal accepted that when the review applicant re-established contact with his family, he viewed himself as having ultimate responsibility for the visa applicants in place of their deceased parents. The Tribunal found that he supported them financially, spoke to them

every week and ensured they attended school. The Tribunal found, on the basis of independent advice, the review applicant assumed a parental role in relation to each of the visa applicants under arrangements made in accordance with recognised customs in the Afghan Hazara culture. The Tribunal found that each visa applicant was the dependent child of the review applicant at the time of application and that, as the dependent child of the review applicant, each visa applicant was the dependent child of the spouse of the family head (the primary visa applicant) and thus, that each was a member of the primary visa applicant's family unit at the time of application. The Tribunal found that each of the visa applicants was a member of the family unit of, and made a combined application with, a person who satisfied the primary criteria in subdivision 309.21 and that they therefore met the criteria in cl.309.311 of the Regulations.

0807998

5 June 2009, Melbourne

Mr J Atkins, Member

CHILD (MIGRANT) (CLASS AH) – SUBCLASS 117 (ORPHAN RELATIVE) – CL.117.211 – CL.117.221 – A delegate of the Minister refused to grant the visa applicant a Subclass 117 visa on the basis that he did not meet cl.117.211 and cl.117.221 of the Regulations as the delegate was not satisfied that the visa applicant's father was missing or that the applicants were related. The delegate noted that the review applicant's spouse visa application stated a different name for her mother and incorrectly stated the visa applicant's year of birth. The review applicant claimed that her husband completed the forms and that he had made mistakes without bothering to check with her. The applicants claimed their mother had died and the review applicant helped her father care for the visa applicant until she came to Australia. She claimed her older brother was taken to fight in the war in Ethiopia and the visa applicant told her that their father had gone to find their older brother, but was missing and had not been seen since. She claimed she tried to locate her father and older brother through the Red Cross without success. She claimed their father consented for the visa applicant to live with a friend and his family and she sent money to the friend to pay for the visa applicant's school fees and support. She claimed the visa applicant would be better off in Australia, where he would receive care, emotional support and attend school. The visa applicant claimed he had stopped attending school because he helped the friend with his children and in his shop. He claimed he did not tell the review applicant he stopped going to school, but would attend school if he came to Australia. The friend confirmed he was a friend of the applicants' father and if their father was alive he would have been in touch. He confirmed the visa applicant did not go to school, and the review applicant was not informed. He claimed school was expensive, he had other children to support and he could not afford for the visa applicant to remain at school. The review applicant offered to provide a birth certificate from Ethiopia to establish that she and visa applicant had the same mother but advised this would take a long time. She also claimed she had considered undertaking a DNA test in order to overcome the problems of obtaining the certificate.

Held: Decision under review set aside

The Tribunal found the visa applicant was an orphan relative of the review applicant. The Tribunal accepted the review applicant's evidence that their mother was deceased, that their father was missing and that all reasonable steps to establish his whereabouts had been taken. The Tribunal accepted that the review applicant would provide the visa applicant with a home and would make him attend school. It found that there was no compelling reason that the grant of a visa would not be in the best interests of the visa applicant. The Tribunal accepted that there were difficulties in obtaining a birth certificate for the visa applicant from Ethiopia. The Tribunal accepted that DNA testing could be expensive and the review applicant's explanation that errors regarding her mother's name and the visa applicant's age were made by her former husband in the application without reference to her. The Tribunal determined that it was unnecessary for the review applicant to undergo a DNA test. Based on the evidence before it, the Tribunal was satisfied that the visa applicant could not be cared for by either of his parents because they were dead or of unknown whereabouts and therefore, he met the requirements of r.1.14. The Tribunal found the visa applicant was an orphan relative of his Australian relative and that he satisfied the criteria of cl.117.211 and cl.117.221 of the Regulations.

0808911

5 June 2009, Melbourne

Ms D Jordan, Member

PARTNER (TEMPORARY) (CLASS UK) – SUBCLASS 820 (SPOUSE) – CL.820.224 – PUBLIC INTEREST CRITERION 4007 – MEDICAL ASSESSMENT REQUIREMENT – A delegate of the Minister refused to grant the visa applicant a Subclass 820 visa on the basis that he did not satisfy cl.820.224 of the Regulations because his dependent children, being members of the family unit who were not applicants for a Subclass 820 visa, did not satisfy Public Interest Criterion 4007. The applicant claimed that he was previously married for 14 years and there are 3 children from this relationship who reside in the United States of America (USA) with their mother. The applicant claimed that he met the sponsor over the internet shortly prior to his marriage ending. They began a relationship 17 days later and the sponsor and the applicant traveled around the USA getting to know each other. They married in the USA 3 months after the relationship commenced and held another wedding ceremony in Australia later that year. The applicant claimed that, although he had initially offered to pay for his children's medical reports, he and his wife (the sponsor) were having financial difficulties and were now unable to do so. Accordingly, the applicant failed to provide the Department with financial and medical information and the delegate refused to grant the visa. The applicant submitted financial information to the Tribunal demonstrating that he and the sponsor were experiencing significant financial difficulties and had been for some time and that they had accumulated significant debts including a substantial amount of unpaid child support. The applicant claimed that he had not seen his daughters since 2004, that he did not tell them he was leaving the USA until he had arrived in Australia and that he tried to speak to them at least every 3 months.

Held: Decision under review set aside

The Tribunal accepted that the review applicant and the sponsor were experiencing long-term financial difficulties, that their combined income was modest and that they owed money to creditors. The Tribunal noted that the applicant had not supported his daughters financially through child support payments or health insurance, that he had not seen them since 2004 and that he did not tell them that he was leaving the USA. The Tribunal consequently formed the view that the review applicant did not have a strong relationship with his daughters and that they were unlikely to migrate to Australia. Therefore, requiring them to undergo medical assessments would be a futile exercise. The Tribunal was of the view that given the nature of the applicant's relationship with his daughters and his parlous financial situation, it would be unreasonable to require them to undergo the required medical assessments as required by cl.820.224(1)(b)(ii). The Tribunal observed that the Procedures Advice Manual 3 states "*Officers must remain alert to aspects that might be relevant to character criteria, including non-payment of maintenance in breach of court orders...*", but noted that this was an issue for the Department to consider. Consequently, the Tribunal remitted the visa application to the Department for reconsideration with the direction that the applicant was taken to have met cl.820.224(1)(b)(ii) of the Regulations.

Student visas

0900417

25 June 2009, Sydney

Mr J Duignan, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 (HIGHER EDUCATION SECTOR) – CL.573.235 – CONDITION 8202 – SUBSTANTIAL COMPLIANCE – A delegate of the Minister refused to grant the applicant a Subclass 573 visa on the basis that he did not satisfy cl.573.235 of the Regulations because he had not complied substantially with Condition 8202 of his previous Subclass 573 visa. The applicant held his last Subclass 573 visa between 27 September 2005 and 30 September 2006. Since then the applicant had held bridging visas which were not subject to Condition 8202. The applicant provided evidence that he was studying a Masters of Commerce at the University of NSW (UNSW) during this period. Information from the UNSW indicated that the applicant was excluded from study for 2 years from 2006 to 2008. The applicant explained that he had failed three subjects in one semester and he understood he was excluded from study. He claimed he spoke with the UNSW about his difficulties and consequently, the period of exclusion was reduced and he resumed his Masters course in Semester 2, 2007. During 2006, the applicant claimed he received a notice from the Department regarding cancellation of his student visa. He

was subsequently informed by the Department that the notice issued was invalid and he claimed he was not asked to provide any further information. He claimed he did not study during 2006 as he had received the visa cancellation notice and was awaiting decisions by the Tribunal and the Federal Court. He claimed he had one examination remaining to complete his Masters of Commerce. In 2009, the applicant claimed he started a Masters of Business Administration course at Holmes College but he ceased his studies when his visa was refused.

Held: Decision under review set aside

The Tribunal found that the applicant had difficulty with his studies during 2005 resulting in notification of a breach of Condition 8202(3)(b), which requires satisfactory course progress. This led to the cancellation of his visa. The Tribunal held that the current assessment of the Federal Court in respect of Condition 8202(3)(b) was that, as the condition stood prior to 1 July 2007, there could not be non-compliance with Condition 8202(3)(b). The allegations of non-compliance and the applicant's conduct in this respect all occurred before 1 July 2007 and, as a result, it was the view of the Tribunal that he could not be found to have not complied with Condition 8202(3)(b) by virtue of the matters giving rise to the cancellation of his visa. Therefore, this was not a basis for considering that the applicant had not substantially complied with Condition 8202. The Tribunal did not consider the applicant's subsequent study was relevant as, after 30 September 2006, the applicant did not hold a visa with Condition 8202 attached. While subsequent notification issues arose in respect of the purported cancellation issue, this did not affect the validity of bridging visas issued nor alter the conditions to which visas held by the applicant were subject at the time. The Tribunal then considered the applicant's compliance with Condition 8202(2) which required enrolment in a registered course of study. During 2006, the applicant was not enrolled in a registered course of study for one and a half semesters while holding a Subclass 573 visa. Following Departmental Policy, the Tribunal found that there had been substantial compliance by the applicant that he maintains enrolment in a registered course of study. In particular, during 2006, the applicant attempted to challenge the cancellation of his student visa through Departmental processes, in the Tribunal and in court. Although he was excluded from study at UNSW during this period and he was not enrolled in any other course of study, the Tribunal noted that the period of supposed exclusion was, in fact, reduced by the UNSW to allow his enrolment for further study in late 2007. This suggested that, had the applicant been able to address his cancellation issues more readily and put the matter before the UNSW, he may have been allowed to re-enrol in 2006 as there was clearly some flexibility in the enrolment ban. Therefore, the Tribunal remitted the matter to the delegate for reconsideration with the direction that the applicant met cl.573.235 of the Regulations.

0900983

2 June 2009, Sydney

Ms S Pinto, Member

STUDENT (TEMPORARY) (CLASS TU) – SUBCLASS 573 HIGHER EDUCATION SECTOR – CANCELLATION S.137J – CONDITION 8202 – SATISFACTORY COURSE PROGRESS – A delegate of the Minister refused to revoke the automatic cancellation of the applicant's Subclass 573 visa under s.137J of the Act. The applicant's education provider issued a written notice under s.20 of the ESOS Act certifying that he had not achieved satisfactory course progress in breach of condition 8202(3)(a) of the Regulations. The applicant failed to respond to the notification within 28 days and his visa was automatically cancelled. The applicant wrote to the Minister seeking revocation of the automatic cancellation of his Subclass 573 visa. The delegate accepted that the applicant's father was unwell and that this may have affected his concentration. However, the applicant chose to sit for his exams and there was no evidence, given that the applicant had previously failed the subject 2 times, to indicate that the applicant would have passed the subject even if he had not received news of his father's illness. The delegate stated that the University of Western Sydney provides free counselling services and there was no evidence to indicate that the applicant sought assistance. The delegate further stated that the University of Western Sydney promotes the enrolment of international students, thereby providing a multicultural learning environment. Accordingly, the delegate concluded that the non-compliance was not due to exceptional circumstances beyond the applicant's control. The applicant claimed that his non-compliance was due to him receiving word from Norway that his father was ill and required major heart surgery. The applicant flew to Norway following his examinations and was present for his father's quadruple bypass operation. The applicant also claimed that, as an international student, he believed that he was not given the assistance he wished and that he had difficulty settling into university life in Australia. He claimed that he has had to change universities as a result of his poor academic

performance and he is now studying at Central Queensland University which offers more relevant courses and assists students to prepare for their future careers.

Held: Decision under review affirmed.

The Tribunal accepted evidence in relation to the applicant's academic results since the commencement of the course, however, it found that the applicant had had considerable difficulty with the subject matter and unfortunately, that he had not prepared the correct cases for one examination. Based on the applicant's history of poor academic results over a significant period, the Tribunal was not satisfied that he would have passed 'Introduction to Business Law', which he had previously failed on 2 occasions and for which his own evidence indicates that he had not adequately prepared, even if he had not received news of his parent's illnesses prior to the examinations. The Tribunal found that it was within the applicant's control to seek a deferment or special consideration in relation to his examinations which he undertook shortly after he heard news of his father's illness, however, he failed to do so. Having regard to all of the evidence, the Tribunal was not satisfied that the applicant's parent's illness was an exceptional circumstance beyond the applicant's control which resulted in the non-compliance with condition 8202(3)(a). The Tribunal accepted that the applicant is a genuine student whose results have improved considerably since he changed education providers. However, the Tribunal found that the applicant had difficulty with his chosen course and that he had not complied with condition 8202(3)(a). Therefore, the Tribunal found that the breach was not due to exceptional circumstances beyond the student's control and that the ground for cancellation under s.116(1)(b) exists. Accordingly, the Tribunal affirmed the decision under review.

Visitor visas

0901814

28 May 2009, Melbourne

Ms S Muling, Member

SPONSORED (VISITOR) (CLASS UL) – SUBCLASS 679 (SPONSORED FAMILY VISITOR) – CL.679.224 – CL.679.228 – GENUINE VISIT – A delegate of the Minister refused to grant the visa applicant a Subclass 679 visa on the basis that she did not meet cl.679.224 and cl.679.228 of the Regulations. The delegate was not satisfied that the visa applicant had provided sufficient evidence of family ties, economic incentives or general cultural links in Cambodia to ensure her return at the expiration of her visa. The review applicant claimed that she had lived with her aunt, the visa applicant, and her uncle from a young age after her mother died. She claimed that she and her husband own a business in which they both work and she also looks after their children. She claimed that she has plans to reduce her work hours to show the visa applicant around Australia when she visits. She claimed that the visa applicant owns a house in Cambodia from which the family have operated a business for over 60 years. The visa applicant makes coffee and her brother's specialty is noodles. The visa applicant claimed that she misses the review applicant and that she thinks of the review applicant's children as her grandchildren. She claimed that her friends visit her shop every day and that this is part of her life. Therefore, she has to go back to socialise with her own people. The visa applicant stated that her brother is her only family in Cambodia and that the review applicant lived with them until she married and moved to Australia. The visa applicant stated that she only wanted to visit Australia to see her niece and her family and that she would return to Cambodia at the end of her visit. Statements in support of the application were also provided.

Held: Decision under review set aside

The Tribunal accepted the applicant's evidence and found that the proposed duration of the visit of up to 3 months was consistent with the expressed purpose of the visa applicant's visit to Australia. It considered the visa applicant's significant ties in Australia but had regard to the fact that the visa applicant and her brother had lived together all their lives and that they shared a home and a business. The Tribunal noted that the review applicant's mother-in-law returned to Cambodia after spending a year in Australia and accepted that the review applicant would not jeopardise the ability of other family members to visit by allowing the visa applicant to remain in Australia beyond the expiration of her visa. It found that the visa applicant had strong family ties in Australia but that her ties to Cambodia were just as strong. The Tribunal gave weight to the visa applicant's ownership of a small business of which she is an integral part and the property which she owns and leases out. It was satisfied that the applicant did not have any intention to remain beyond the

period of her permitted stay and that her intention to visit was genuine. The Tribunal found that the applicant was not subject to the risk factor in cl.4011(2)(a) as there was no evidence that during the five years immediately preceding the application the visa applicant applied for a visa or entry permit for permanent residency in Australia. Accordingly, the Tribunal found the visa applicant satisfied the requirements of cl.679.224 and Public Interest Criterion 4011 of cl.679.228 of the Regulations.

Other visas

0808588

23 May 2009, Sydney

Dr S Crosdale, Member

PROSPECTIVE MARRIAGE (TEMPORARY) (CLASS TO) – SUBCLASS 300 (PROSPECTIVE MARRIAGE) – S.116 – CANCELLATION – EXERCISE OF DISCRETION – A delegate of the Minister cancelled the applicant's Subclass 300 visa under s.116(1)(a) of the Act on the basis that his relationship with the sponsor had ceased and therefore, the circumstances which permitted the grant of the visa no longer existed. The applicant claimed that he met the sponsor one week prior to returning to Lebanon on a previous visit to Australia to see his family. He stated that the purpose of his current visit to Australia was to marry the sponsor and not to study. He claimed that about one month after his arrival, the sponsor ended the relationship. He had hoped they would get back together but he heard that she became engaged to someone else. The applicant's representative claimed that the applicant had suffered a lot from the sponsor's treatment because he had discontinued his studies in Lebanon, he lost a lot of money and he had his dreams shattered through no fault of his own. The applicant stated that after his broken engagement many girls had wanted to become engaged to him but he did not want to become engaged just to remain in Australia. The applicant and his sister claimed the break up of the relationship had caused him to become scared of another relationship or engagement. Furthermore, he claimed he had lost money in paid university fees in Lebanon, in planning the wedding and bringing gold and gifts to Australia. The applicant later admitted he did not lose a lot of money as he only completed one week of law studies in Lebanon and the sponsor returned the gifts to him. The applicant claimed he would suffer hardship in relation to his law course. He had been a law student in Lebanon and if he returned to Lebanon he would have to start his studies again. He claimed he would have wasted two years of his life as the education in Australia differed from the education in Lebanon and he wished to study in Australia.

Held: Decision under review affirmed

The Tribunal was satisfied that the circumstances that permitted the grant of the visa no longer existed as the applicant confirmed that his relationship with the sponsor had ceased and that he believed she had become engaged to someone else. Thus, the applicant's visa was subject to cancellation pursuant to s.116(1)(a). Accordingly, the Tribunal considered whether to exercise its discretion to cancel the applicant's visa having regard to relevant policy, circumstances, the purpose of the visa holder's travel to and stay in Australia and the degree of hardship which may have been caused to him and to any family members. Based on the applicant's and his sister's evidence regarding his relationship with the sponsor, the Tribunal gave little weight to concerns that the engagement was contrived for migration purposes. It accepted the evidence provided by the applicant and his sister that the applicant had suffered distress following the breakdown of his relationship with the sponsor. However, the Tribunal had difficulty believing the applicant would suffer hardship in relation to his law studies as he had only studied in Lebanon for one week. The Tribunal noted that the applicant was a young man, that he had family in Lebanon and that he was not at a stage of life where returning to his home country would cause him any disadvantage in re-establishing relationships, recommencing his studies and to his economic future. It found that even if the visa was not cancelled, the applicant would not be in a better position as his visa would no longer be in effect and he would be required to leave Australia. The Tribunal found that the power to cancel the visa should be exercised. Considering the circumstances as a whole, the Tribunal concluded that the visa should remain cancelled.

0800719
19 June 2009, Sydney
Mr J Cipolla, Member

INVESTOR RETIREMENT (TEMPORARY) (CLASS UY) – SUBCLASS 405 (INVESTOR RETIREMENT) – CL.405.227 – NET VALUE OF ASSETS, ANNUAL NET INCOME AND DESIGNATED INVESTMENT –

A delegate of the Minister refused to grant the applicant a Subclass 405 visa on the basis that she did not provide evidence of sufficient funds to satisfy the requirements of cl.405.227(2) and 405.227(4) of the Regulations. The applicant claimed that her husband was deceased and she provided evidence that she had AUD629,720 available for transfer. The applicant's migration agent submitted that if an applicant satisfied that their assets, available for transfer and capable of being transferred to Australia was at least AUD500,000, then the same funds could be used to make a designated investment of an amount of at least AUD500,000. The migration agent submitted that "the only support the Department had offered for its view on the legislation was its own opinion, albeit sourced at the Departmental National Office as you put it. However, the view of the Departmental National Office has not been formulated as a consistent part of policy within the PAMS or Migration Series Instructions or indeed put before parliament as a disallowable instrument. To this extent we would submit that the Department's view is no more than an *ipsi dixit* contention". He further submitted that, for this reason, cl.405.227(2)(a) and (c) are capable of being cumulatively read and that the applicant would then meet the requirements for this subclass of visa. The delegate refused the visa on the basis that the same funds cannot satisfy the requirements at both cl.405.227(2)(a) and (c). These are separate criteria that refer to separate funds.

Held: Decision under review affirmed

The Tribunal accepted that the applicant had assets to the value of AUD665,069 that were capable of being transferred to Australia at the time of its decision and therefore, it found that the applicant satisfied cl.405.227(2)(a). It noted that the argument to date had centred around the cumulative reading of cl.405.227(2)(a) and (c); however, the applicant also needed to satisfy cl.405.227(2)(b) which requires that the applicant has access to an annual net income of at least AUD50,000. There was no evidence before the Tribunal that the applicant had access to an annual net income of at least AUD50,000. Accordingly, the Tribunal found that the applicant did not satisfy cl.405.227(2)(b). The Tribunal also noted that no convincing argument had been provided that the regulatory provision in question was capable of being read cumulatively with regard to cl.405.227(2)(a) and (c). The argument posited by the representative was that, if an applicant had at least AUD500,000 at their disposal that was capable of being transferred to Australia, there was nothing within the regulatory provisions which precluded those same funds being used to form the designated investment with the relevant regional sponsoring authority. However, with regard to the drafting of the provision and what the Tribunal considered to be the underlying legislative intent, it considered that its intent was that an applicant for an Investor Retirement visa be able to satisfy the provisions of cl.405.227(2)(a), (b) and (c). The legislative provision was drafted in such a way that an applicant was required to satisfy each of these provisions and it was not an either/or provision. The Tribunal noted that if it was to proceed to a decision in favour of the applicant, on its reading of the regulatory provision, cl.405.227(2)(a), (b) and (c) would need to be satisfied. There was no evidence before the Tribunal with regard to cl.405.227(2)(b), namely that the applicant has access to an annual net income of at least AUD50,000. Accordingly, the Tribunal affirmed the decision not to grant the applicant an Investor Retirement (Class UY) visa as she was incapable of meeting the requirements of cl.405.227(2) of the Regulations.

REFUGEE REVIEW TRIBUNAL DECISIONS

Australia

0901642

3 June 2009, Sydney

Ms A Younes, Member

AUSTRALIA – STATELESS – RELIGION – CHRISTIAN – PARTICULAR SOCIAL GROUP – ‘BLACK CHILDREN’ – The applicant claimed to fear persecution on the basis of her Christian religion and membership of a particular social group, that of ‘black children’ born outside of China’s one child policy. The applicant and her two siblings, the secondary applicants, are children who claimed to be stateless, having been born in Australia to Chinese parents who were not Australian citizens and did not hold Australian permanent resident visas, current Chinese National Identity cards or Chinese household registrations. The applicant claimed it was not possible for her or the secondary applicants to be recognised as Chinese or registered in a household card. She claimed that without a household card, they could not access public education, public health or social welfare. The applicant’s mother claimed the Chinese Consulate in Sydney had refused to issue her and her husband with Chinese passports because they had applied for protection visas. After unsuccessfully applying for a protection visa in 2001 she remained in Australia unlawfully. The applicant’s mother claimed that she was a Christian and a member of an underground Church in China, but that she had not claimed this as a ground for seeking protection in Australia. The applicant submitted evidence from a pastor that she and other members of her family had engaged in Christian related activities in Australia. She claimed that if she returned to China, she would be forced to undergo sterilisation and she would not be able to register the applicants. The applicant’s advisor claimed she had spoken to a principal of a clinic in China who had told her every member of the village where the applicant’s mother comes from had been forced to undergo sterilisation, which does not happen in the cities.

Held: Decision under review set aside

The Tribunal was satisfied that the children would be able to secure recognition as Chinese citizens and did not accept that they were stateless. The Tribunal noted that the applicant’s claims to fear harm were essentially based on the administration of China’s one child policy. The Tribunal determined that while this law is arguably one of general application, if the applicant were to return to China she would suffer serious harm amounting to persecution as a result of the application of the one-child policy. The Tribunal was satisfied that the applicant was a Christian and that if she were to return to China, she would practice her religion. It was satisfied that independent country information indicated that members of underground churches could be persecuted by Chinese authorities. The Tribunal accepted there was a real chance the applicant would be persecuted for her and her family’s religious activities and beliefs if they were to return to China, and that this persecution would constitute serious harm. The Tribunal was thus satisfied that in the applicant’s case, because of her Christian faith and the hardship the family would face, the application of the one child policy would amount to persecution. The Tribunal accepted that the applicants could be discriminated against for being ‘black children’ as they would be denied registration and access to an affordably priced education, medical, social and other services. The Tribunal considered that the denial of basic medical services could, in some circumstances, be life-threatening, and therefore constituted serious harm. Thus, the Tribunal found that the applicant had a well founded fear of persecution for a Convention reason because of her membership of the particular social group of ‘black children’ and for reason of her Christian religion.

Bahrain

0902971

2 July 2009, Sydney

Ms J Marquard, Member

BAHRAIN – RELIGION – MEMBERSHIP OF A PARTICULAR SOCIAL GROUP – FORMER CIVIL RIGHTS PROTESTER – POLITICAL OPINION – The applicant claimed to fear persecution for reasons of his religion as a Shi'ite Muslim, his membership of a particular social group (former imprisoned civil rights protestors) and his imputed political opinion. He claimed that he actively participated in student political unrest, and in 1994 he collected signatures calling for the nullification of the State Security law and court, the reinstatement of the 1973 constitution and the return of the dissolved elected parliament. He claimed that he was arrested in 1996 and detained for three years where he suffered physical and mental torture, he was imprisoned without charge and he had no access to a lawyer. He claimed that he was blacklisted, his passport was confiscated, he had difficulty finding work and he was denied an education and could not travel overseas. He claimed his passport was returned to him in 2001 after he was coerced to sign papers without being able to read the contents. He claimed that blacklisting was normal for Shia people who had been arrested and this made it difficult to get work. In 2006 he went to the USA for a year to study English. He returned to Bahrain in 2007 as the situation was relatively calm. He obtained work but after 3 months he claimed he was fired because his employers became aware of his security imprisonment. In October 2008 he was out of work and was not permitted to enroll in a university degree however he was able to obtain a tourist visa and he traveled to Australia. He claimed he was a known and well documented opponent of the regime and feared that if he returned he would be tortured and made to confess he was involved in a terrorist plot. He claimed he could be charged with the death penalty and feared a repetition of the interrogation and torture he was subjected to previously. He provided a letter from his lawyer confirming that the 3 years he spent in prison "was in execution of this punishment". A letter from a human rights centre was also provided documenting his political activities in the 1980's. Country information, reports on human rights practices, and the treatment of ex-detainees and returnees were also provided in support of the applicant's claims.

Held: Decision under review set aside

The Tribunal assessed the applicant's claims based on his political opinion and found him to be credible and consistent in his evidence. The Tribunal accepted that he participated in political activities based on his thorough knowledge of political affairs of the time and the detailed account of his situation. The Tribunal placed weight on his lawyer's letter and on comments from the human rights centre which corroborated his story that he collected signatures, was imprisoned, tortured and forced to sign papers. It also confirmed that he was on a government blacklist, that his passport was held by the authorities and that he found only menial jobs, then he was fired when his employers discovered his security record. The Tribunal found country information was consistent with the applicant's account that he collected signatures, and about the ensuing protests, clashes, and arrests and details of his torture, length of his detention and release. Country information also supported his claims of some political improvements, and further backed up his evidence that ex detainees were arrested, that new activists were intimidated by the arrest of older ones and that the human rights situation had generally deteriorated. The Tribunal accepted the applicant's deeply emotional recount of his prison experiences and that he was physically harmed through lashings and torture, psychologically harmed by threats against him and his family, and by the length of his detention when he was young and vulnerable. The Tribunal accepted the applicant would suffer serious harm and that he may be arrested, interrogated, tortured and discriminated against if he returned. Also, if he relocated he could be easily found wherever he resided and it was not possible to relocate to avoid persecution. Accordingly, the Tribunal was satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Bangladesh

0901592

13 May 2009, Sydney

Ms K Raif, Member

BANGLADESH – PARTICULAR SOCIAL GROUP – HOMOSEXUAL – RELIGION – MUSLIM – RELATIONSHIP WITH HINDU – The applicant claimed to fear persecution on the basis of his membership of the particular social group, 'homosexuals in Bangladesh', and for reason of his Islamic religion. The applicant was interviewed by Immigration Department officials at the airport upon arrival in Australia, where he claimed to be married and seeking protection because his wife had hired people to kill him. He reiterated these claims when interviewed in immigration detention five days later. The applicant's protection visa application was subsequently lodged, claiming fear of persecution based on his homosexuality. The applicant claimed that his family would ostracize him if he did not conform and marry. He claimed to have been subjected to mistreatment because of his sexual orientation by his brother, cousin and other people, and to be in fear of the Islamic fundamentalist group Jamayetul Mujahideen of Bangladesh (JMB) who had learned of his homosexual relationship and were unhappy about it. The applicant claimed to have had two significant homosexual relationships prior to leaving Bangladesh. Both of the applicant's claimed former partners submitted statements and gave evidence to the Tribunal.

Held: Decision under review affirmed

The Tribunal accepted that homosexuals constituted a particular social group in Bangladesh; however it did not accept that the applicant was a member of this social group as he claimed. The Tribunal did not accept the applicant's claims that he provided false information in his interviews with immigration officials at the airport and in immigration detention because he was physically and emotionally tired, afraid the information would be published in the media, and concerned about disclosing his true refugee claims in the presence of the Bengali interpreter. The Tribunal was of the view that if the applicant had been genuinely fearful of returning to Bangladesh, he would have disclosed and discussed his circumstances, because his failure to do so may have resulted in him being deported and, as he claimed, subjected to serious harm. The applicant's failure to mention his fear of persecution based on his homosexuality until a month after his entry to Australia, and his references to being married, caused the Tribunal to question the authenticity of his claims. The Tribunal found the applicant's claims about his homosexuality and description of the physical and mental harassment he claimed to have suffered to be vague and lacking in details. The Tribunal found the evidence provided by the applicant's former partners to be vague, lacking in detail and inconsistent. Further, the applicant was unable to provide details of significant matters related to his claimed relationships such as their duration and description of living arrangements. This led the Tribunal to conclude that the applicant and his claimed former partners had not been truthful in their evidence and that the applicant's claims had been fabricated to further his protection application. The Tribunal did not accept that the applicant was, or had ever been perceived to be, a homosexual or that he had ever engaged in homosexual activities. As such, the Tribunal did not accept that the applicant had ever been attacked, physically harmed or threatened because of his homosexuality. The Tribunal noted that "the applicant claimed to have been harassed due to his religious beliefs because of his homosexuality and not for any other reason". As the Tribunal did not accept that the applicant was a homosexual, it did not accept that fundamentalists or any other religious person or group wished to harm him because of his claimed homosexuality. Thus the Tribunal found that there was no real chance the applicant would be persecuted for a Convention reason if he were to return to Bangladesh now or in the reasonably foreseeable future.

China

0803136

30 June 2009, Sydney

Ms B Connolly, Member

CHINA – ETHNICITY – HUI – RELIGION – MUSLIM – POLITICAL OPINION – The applicant claimed to fear persecution on the basis of his Hui ethnicity and Muslim religion. The applicant claimed to have been arrested and detained by Chinese authorities on four occasions. He claimed that the first time he was arrested was with his father in 1989 during prayers at a mosque. His father was detained for three years and he was detained for three weeks. The applicant claimed to have been assaulted, threatened, and deprived of food and water while detained. He also claimed he was forced to sign a statement that he was involved in illegal activities. In 1997 the applicant claimed to have again been detained, interrogated and tortured after attending a demonstration with his father and other Huis and Uighurs. The applicant claimed that his mother was tortured to death by police on the morning of this rally and that his father became mentally ill after hearing of her death subsequent to his and the applicant's release from detention. In 2003, the applicant claimed to have been detained for about 15 days by police. He stated he was hit with a baton and tied to a chair while lit cigarettes were put on both his arms. The applicant claimed to have been detained and beaten on a fourth occasion in 2006 after resisting police demands that he leave a mosque in which he had been praying. He claimed that between arrests and detentions he was under surveillance and often questioned by police and asked about the activities of people he knew. The applicant claimed that in his province of Xianjiang, Hui people could not obtain passports through official channels and it had taken him two years to get a passport and, in order to do so, he claimed to have bribed four levels of state apparatus. He claimed to have also bribed a travel agency to obtain his visa for Australia. The applicant claimed that in Australia he had participated in a meeting with a renowned Uighur leader, whom the Chinese authorities regard as a terrorist. The applicant claimed to fear persecution on the basis of this meeting, his application for protection in Australia and records of his previous activities held by the Chinese authorities.

Held: Decision under review set aside

The Tribunal accepted independent information that authorities in Xianjiang Province, China, are restrictive in their attitude to the free expression of religious beliefs, particularly in relation to Muslims. The Tribunal accepted that policies implemented by the local government in Xianjiang Province had resulted in persons of Hui ethnicity being discriminated against or harmed. The Tribunal accepted that the applicant had been seriously affected by government policies and practices which inhibited his ability to practice his religion freely because of his Hui ethnicity. The Tribunal further accepted that the applicant was arrested on the four occasions claimed, and that his father was also detained on some of these occasions. The Tribunal accepted that between arrests and detentions the applicant was the subject of attention from local authorities, and that he was often questioned and taken to local police stations. The Tribunal accepted that the applicant's mother died while he and his father were arrested and detained in 1987, and that the applicant's father became mentally ill as a result. The Tribunal was further satisfied that the applicant could be regarded as a separatist in China as a consequence of his activities in Australia. In light of independent information, the Tribunal was satisfied that there was a real chance that the applicant would be subject to serious harm amounting to persecution, including arrest and detention for reasons of his political opinion, Hui ethnicity and Muslim religion if he were to return to China now or in the reasonably foreseeable future. Accordingly, it found that the applicant did not have a well founded fear of persecution for a Convention reason.

0901671

2 June 2009, Sydney

Ms P Leahy, Member

CHINA – RELIGION – CHRISTIAN – UNDER AGE MARRIAGE – FAMILY PLANNING – The applicant and her husband and baby claimed to fear persecution for reasons of their Catholic religion. The applicant claimed that she was born into a traditional farming family which had large debts so they arranged for her to marry a much older wealthy Chinese man overseas and her parents forced her to live with him but she could not accept this. She told him she would marry him after she returned from studying overseas if he paid for her studies and helped her parents financially. The applicant husband claimed he also agreed to an arranged marriage on the condition that he was allowed to study abroad prior to the marriage. They both came to

Australia on student visas and commenced cohabiting without their parent's knowledge. The applicant became pregnant and, following the birth of their baby, they married. They claimed that when they told their parents, they became very angry and stopped their financial support. The applicant and her child returned to her family in China for several weeks, however, her family still wanted her to marry the old man and they had serious arguments so she left after three days. She claimed that because they were not the legal age to marry in China, their marriage would not be recognised and the baby would not be registered. Also, they would be punished by the government, their child may not be accepted for kindergarten and school; they would not have welfare benefits; she would be penalised in study and employment and they would be discriminated against at all levels by government policy for violating the family planning rules.

Held: Decision under review affirmed

The Tribunal formed the view that the applicants were reliable witnesses and it accepted that they met up in Australia, had a son and that they married soon later. Based on country information, the Tribunal accepted that both adult applicants were not of a legal age to marry in China and as their child was born out of wedlock, it was therefore illegal in China for the applicant wife to have a child. There was no evidence before the Tribunal that the enforcement of Chinese population control policies would be discriminatory in this case. The Tribunal therefore found that any punishment to which the applicants might be subjected in China for violating the population control or family planning laws would not constitute persecution in a Convention sense. The Tribunal accepted that the parents of the applicant wife wished her to marry another man for financial reasons and that they continue to reject the applicant's marriage and the child of that marriage. While the Tribunal accepted that the applicant had a subjective fear of retribution from her parents and the other man had approached her parents for the return of his money, it did not accept that there was a real chance that the applicant would be seriously harmed by either of them as she had returned to China for several weeks and was not physically harmed by anyone. Even if the applicant were to be seriously harmed if she returned to China, which the Tribunal found to be a remote possibility, the Tribunal found that any harm done to her would not be done for any of the five Convention reasons, but rather for personal reasons. There was no evidence before the Tribunal that the applicant would fail to receive state protection against any criminal assault of this kind. The Tribunal found that the applicants are not baptised Christians, nor have they ever practised Christianity in China. Accordingly, it did not accept that there was a real chance that they would be persecuted for this reason if they were to return to China in the foreseeable future. Based on the evidence before it, the Tribunal was not satisfied that there was a real chance that the applicants would face Convention-based persecution in China if they returned there within the foreseeable future.

Czech Republic

0901933

12 June 2009, Sydney

Mr J Silva, Member

CZECH REPUBLIC – ETHNICITY – ROMA – PARTICULAR SOCIAL GROUP – UNEMPLOYED ROMA NON-CITIZEN – The applicant claimed to fear persecution for reason of his ethnicity as a Roma. He claimed that he was verbally and physically abused at school, skinheads broke all the windows and wrote racist graffiti on the walls of his home in the Czech Republic, they used abusive anti-Roma terms and threatened to burn them. He claimed to fear verbal and physical harassment, and possibly death in the Czech Republic. He claimed that skinheads murdered his uncle and that his relatives were killed in concentration camps. The applicant stated that the Czech State would not protect him, despite its membership of the European Union (EU). He claimed that Roma people faced harassment and a lack of respect throughout Europe. He stated that he had committed several offences in New Zealand (NZ) and he had requested the Minister's intervention because he did not wish to be separated from his Australian wife. He claimed he would be unable to work anywhere in the EU due to his Roma ethnicity, his age, his limited skills and because he only speaks Czech. Taking into account his particular circumstances, he feared economic hardship and denial of access to basic services, amounting to persecutory harm. He referred to possible harm in Spain from secret agents, neo-Nazis, gangs and others who might be motivated by rising unemployment and racial tensions to target Roma and other minorities. He claimed he would not renew his Czech passport that was due to expire shortly. Therefore, he claimed he had a well-founded fear of

Convention-related persecution in all EU countries on the grounds of Roma ethnicity and as a member of a particular social group being unemployed Roma non-citizens.

Held: Decision under review affirmed

The Tribunal accepted that the applicant was of Roma ethnicity and considered it was unnecessary to determine whether he had a well-founded fear of persecution in the Czech Republic due to his status as an EU citizen. The Tribunal found that there was at least one EU Member State, which included Spain, in which the applicant had a right to enter and reside. It was satisfied that the applicant's age and the nature of the offences committed in NZ did not remove his right to enter and reside in Spain and a criminal record in itself would not be enough to invoke expulsion measures. The Tribunal found that at the date of this decision, it was possible for the applicant to travel to Spain on his current passport or apply for a new Czech passport here and, on arrival, register with the authorities thereby availing himself of his right to enter and reside in Spain. The Tribunal found that the applicant had not taken any of those steps and therefore, he had not taken all possible steps to avail himself of his right to enter and reside in Spain. The Tribunal accepted, albeit with reservations, that there may be a particular social group in Spain consisting of 'unemployed Roma non-citizens'. The Tribunal was satisfied that the feared persecution was not the attribute of being 'unemployed', but rather the consequences of being unemployed, Roma and a non-citizen of Spain. The Tribunal noted the large amount of country information (CI) on the disadvantages and problems for Roma in Spain generally and for unemployed non-citizens. These did not indicate whether the applicant had a well-founded fear of persecution in that country now or in the reasonably foreseeable future. The Tribunal considered that the applicant's circumstances differed markedly from other non-citizens, including Roma non-citizens, because he was a Czech citizen who had lived in English-speaking environments. The Tribunal noted reports of individual instances of abuses against Roma by certain groups in Spain however, violent incidents did not appear to be widespread and CI did not indicate that being a Roma in Spain established a real chance of persecutory harm. The Tribunal also considered the applicant's particular circumstances, being a Roma non-citizen, who may have difficulty finding work, but did not accept he would attract negative interest. Thus, it found that the applicant's fear of persecution in the form of physical harm was not well-founded. The Tribunal found that Spain's measures to combat general discrimination against Roma constituted an adequate level of protection. The Tribunal found that the applicant had a right to enter and reside in Spain and that he had not taken all possible steps to avail himself of that right; that he did not have a well-founded fear of persecution in Spain and that there was no real chance that Spain would return him to the Czech Republic. The Tribunal found the applicant's return to Europe may create hardship for his Australian wife and family, it was likely he would face practical challenges in finding work and accommodation in another EU country and that his criminal record in NZ did not appear to be serious. The Tribunal was not satisfied that the applicant was a person to whom Australia had protection obligations and that he did not have a well founded fear of persecution for a Convention reason.

India

0808706

1 July 2009, Melbourne

Mr P Murphy, Senior Member

INDIA – RELIGION – WORLD YOUTH DAY – CONGRESS PARTY – POLITICAL OPINION – The applicant claimed to fear persecution for reason of his political opinion, being a member of the Congress Party, and because he is a practising Catholic. The applicant claimed that he first left India for Australia in July 2008 to attend World Youth Day (WYD) in Sydney. In his initial protection visa application, the applicant stated that he would be at risk in India because of his involvement with the Congress Party. The applicant claimed that he had previously held a party position in a rural area in the Punjab. He claimed that he feared members of opposition parties; Akali Dal, Shiv Sena and Bajrang Dal. He claimed that in 2001-2002 he and other party workers were attacked by opposition workers from Akali Dal, but provided no further details. The applicant also claimed that in 2008 he attended a religious ceremony in Haryana state, where he and others were attacked by Akali Dal and Shiv Sena supporters. He claimed to have sustained injuries and attended hospital, where he stayed for several days. He claimed that a report had been lodged with the police but that, according to the religious leader who held the ceremony, no action was taken by police. The applicant stated that he moved to another district in the Punjab for a while as he feared for his safety. He claimed that it was then that he found out about WYD and spoke to his Priest about attending the event, as he and his

family agreed that he should leave the area for a few days. When he returned from WYD to India, the applicant claimed that he went to Delhi because a friend had told him that people were looking for him and had attended his house asking about his whereabouts. He claimed that he stayed with an uncle for a few days who said that he should go back to Australia to save his life.

Held: Decision under review affirmed

The Tribunal did not find the applicant credible on a number of critical issues; particularly the difference between what was contained in his protection visa application and his evidence at the Tribunal hearings. The Tribunal accepted that the applicant is a member of the Catholic faith, supported by a letter from the applicant's Priest. It did not, however, accept that the applicant has experienced past persecution – or his assertion that he would face a real chance of persecution on his return to India now or in the reasonably foreseeable future – because of his Catholic faith or his conversion to Catholicism. In reaching this conclusion, the Tribunal noted that the applicant was unable to identify any instances of religious-motivated harm and also took into account country information, namely the US Department of State's *International Religious Freedom Report for 2008*. The Tribunal rejected the claim that the applicant would face harm on return to India because he had travelled to attend a religious function in Australia (WYD). The Tribunal also did not accept that his decision to attend WYD was in any way connected or associated with involvement in the incident claimed to have occurred in March 2008. It found the applicant's evidence to the Tribunal on these issues lacked credibility, and in particular was inconsistent with the material supplied in support of his visitor's visa which indicates his application for World Youth Day was commenced at least a month prior to the date in which he says he was attacked. The Tribunal accepted that the applicant may have been a supporter of Congress Party candidates in his local area, and may also have been involved in recruiting and promotional activities for the Congress Party in that area in the past. However, it found that the applicant was never a high profile member of that party or held any senior or leadership position, as described by the applicant himself. The Tribunal noted that it could dismiss the possibility that, as a consequence of the applicant's support for the Congress Party, the applicant may in the past have been subjected to some intimidation by opponents of the Congress party. This was consistent with country information which suggested that politics in the Punjab can be volatile, particularly around election times. However, the Tribunal did not accept it was of sufficient significance to amount to 'serious harm' of the type contemplated by section 91R(1) to constitute persecution. Accordingly, the Tribunal was not satisfied that the applicant faced a real chance of persecution now or in the reasonably foreseeable future for a Convention reason.

Indonesia

0901657

11 June 2009, Melbourne

Ms D Buljan, Member

INDONESIA – 1998 JAKARTA RIOTS – HEARING NON-ATTENDANCE – NO CONVENTION GROUND – The applicant claimed to fear persecution from "extremist people" involved in the 1998 riots in Jakarta and feared for his safety and freedom. He claimed that during riots in Jakarta everything was destroyed; there was violence, nobody tried to stop it and he was frightened, sad and traumatised. He claimed that the authorities were unable to protect the people so he moved away from Jakarta to live in Aceh. However, in 2004 the tsunami destroyed everything he had owned. The delegate in the primary decision found that the applicant had not provided detailed incidences of the harm feared or that he was personally targeted during the riots. The delegate found the loss of the applicant's possessions in the tsunami was a personal misfortune and that the reasons he feared harm were unrelated to any Convention ground. The delegate also found that there was no evidence to suggest that the authorities were unwilling or unable to protect him for a Convention reason. No evidence was provided in support of his application for review.

Held: Decision under review affirmed

The applicant was invited to appear before the Tribunal to present oral evidence; however, he did not appear nor did he contact the Tribunal to explain his non attendance or seek a postponement of the hearing. Therefore, pursuant to section 426A of the Act, the Tribunal decided to make its decision on the review without taking any further action to enable the applicant to appear before it. The Tribunal took into account the applicant's claims but found that they were very general and lacking detail in significant respects. It

found that he provided no details of the date of the alleged riots, or the identity of the perpetrators of the attacks. In addition, he did not provide details regarding when he was targeted by the alleged rioters or why he believed the government had failed to protect its citizens during such riots. The Tribunal found that the applicant provided little detail of specific instances of harm. Based on the evidence before it, the Tribunal was not satisfied that the applicant was involved in or affected by the alleged riots nor that the government failed to protect its citizens during these events. It found that the applicant did not identify the perpetrators of the alleged persecution or the selective or discriminatory conduct that gave rise to his fear. He did not identify how the harm which he feared was related to any Convention grounds and the Tribunal was not satisfied the applicant fled for his own safety. The Tribunal found that the applicant has not provided the level of detail necessary to satisfactorily establish the relevant facts of his case. The Tribunal noted that if the applicant had attended the Tribunal hearing, these matters would have been investigated in greater depth with him. The Tribunal had insufficient evidence to be satisfied that his essential and significant reason for the harm feared was related to any Convention grounds or that he was denied the protection of the State or forced to flee. Accordingly, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution for a Convention reason.

Israel

0903074

26 June 2009, Melbourne

Mr D Lennon, Member

ISRAEL – POLITICAL OPINION – PARTICULAR SOCIAL GROUP – CONSCIENTIOUS OBJECTOR –

The applicant claimed to fear persecution for reasons of her political opinion and membership of a particular social group. She claimed that Israel is a violent place that it is subject to terrorism and that she fears being a victim of a bomb attack. She claimed she opposed popular political opinion and she would speak out against the war and participate in demonstrations to publicly express this opposition. She claimed not to have done this previously because she would have been persecuted, criticised, socially stigmatised and overlooked for jobs and educational opportunities. She claimed that if she returns to Israel she would be forced by the authorities to undergo additional military service annually until the age of 35. She claimed she would be persecuted, punished and jailed if she refused. The applicant claimed that she had been called three times previously for military service and that she had avoided it by going overseas. She claimed that when she made the statement accompanying her visa application she was unrepresented and her application referred to military service but did not indicate that she would refuse on the basis of being a conscientious objector. She claimed that in her initial review process, the first Tribunal hearing had been quick and she didn't have a chance to explain why she didn't want to do military service. She claimed that if she returned to Israel, there was a real risk of serious harm because of her objection to military service on the basis of conscience. The Federal Court found the applicant's evidence gave rise to an unarticulated claim of a fear of persecution as a conscientious objector and therefore, the decision was remitted back to the Tribunal.

Held: Decision under review set aside

The Tribunal initially considered the applicant's failure to mention that she was a conscientious objector in her visa application form but found that this was due to an oversight and ignorance of the need to particularise the Convention ground which was being relied upon and found that this had not undermined the credibility of her claim to be a conscientious objector. The Tribunal accepted that the applicant had undertaken compulsory military service in the Israeli Army between October 2000 and July 2002. The Tribunal accepted country information which states that Israel requires that even after an individual has completed their compulsory military service of two years, that women complete an additional 31 days per year military service until they reach the age of 34 years. Therefore, as an individual who had already completed two years military service, the applicant would find it difficult to obtain exemption from the exemptions committee in light of the country information that "[w]omen are only entitled to submit applications to the committee before they are called up for the first time for military service." It also accepted that she would be forced to be discreet about her political opinions to avoid punishment. The Tribunal found the Israeli defence laws were not laws of general application since there was an ability to be exempt from military duty. The Tribunal found that, even if the law was one of general application, it was not persecution if it did not impact differentially for a Convention related reason. It found that if individuals were more likely to be punished, or their punishment was of greater severity than others to whom the law applied, this could amount to persecution. The Tribunal found the applicant was exposed to the real chance of a differential impact of the

Israeli defence laws by reason of her membership of a particular social group being conscientious objectors, and for her political opinion (conscientious objection). Accordingly, the Tribunal was satisfied that the applicant had a well founded fear of persecution for a Convention reason.

Russian Federation

0807987

9 June 2009, Sydney

Mr G Short, Senior Member

RUSSIAN FEDERATION – ETHNICITY – SOYOT – POLITICAL OPINION – The applicant claimed to fear persecution on the basis of his Soyot ethnicity and political opinion, namely his activities as a member of the human rights organisation 'Nizhenovgorodskoy organization "The Committee against tortures"'. He claimed he had taken part in meetings and protest actions and that these activities had attracted the attention of the authorities who had 'faked a criminal action' against him, and that the police had beaten, tortured and threatened to kill him. The applicant claimed that he had his own personal training business in Russia and that he had hired a sports hall from a local organisation, signing a contract with the organisations' head, Person A. He claimed Person A had demanded a share of the business' profits so he moved the sports equipment to his home. He was then visited by the militia who repossessed the equipment and told him that Person A had accused him of stealing it. The applicant claimed to have been imprisoned for 3 or 4 months, that the matter had gone to court and he had won. However, his equipment was not returned to him. The applicant claimed he had been frequently held up by the militia and then released with no precise allegations. The applicant claimed that this and the failure to return his sporting equipment occurred because Person A was a close friend of the local prosecutor. The applicant later claimed his arrest and imprisonment were because of his activities as a member of the Nizhniy Novogorod Committee Against Torture. He submitted a translated 'court decision' stating that a criminal case was instituted against him in relation to claims he stole athletic equipment owned by Person A's organisation. The document states that the case was abandoned three months later because it was impossible to prove that all the equipment had been acquired by Person A's organisation. The applicant claimed that in spite of being acquitted of this, other charges were still open.

Held: Decision under review affirmed

The Tribunal did not accept that the applicant was a witness of truth and found that he provided inconsistent information in his application, at Departmental interview and at the Tribunal hearing about the duration and timing of his arrest and detention and about his involvement with the Committee Against Torture. It also did not accept that he protested against violations of human rights in Russia. The Tribunal accepted evidence from the Committee Against Torture that the applicant was never a member of, nor had he worked for, the Committee. The Tribunal did not accept that the applicant was detained on false criminal charges as claimed. The Tribunal did accept that the applicant was accused of stealing the sports equipment when he removed it from the personal training business premises, however, it did not accept that the case somehow remained open as claimed. The Tribunal found that the essential and significant reason why the applicant was charged with stealing the sports equipment, why the equipment was not returned and why the applicant was subsequently harassed by police, was that Person A was a close friend of the local prosecutor as claimed. The Tribunal did not accept that the applicant was singled out and persecuted in the past because of his claimed involvement in the Committee Against Torture or for protesting against violations of human rights in Russia more generally. Consequently, the Tribunal did not accept there was a real chance that the applicant would become involved in such activities if he returned to Russia. Therefore, the Tribunal did not accept there was a real chance that the applicant would be persecuted for reasons of his real or imputed political opinion if he returned to Russia now or in the reasonably foreseeable future.

FEDERAL COURT JUDGMENTS

MIAC v SZMOK

[2009] FCAFC 83

Federal Court of Australia, Emmett, Kenny & Jacobson JJ, NSD 86 of 2009, 2 July 2009

This was an appeal by the Minister from a judgment of the Federal Magistrates Court setting aside a Refugee Review Tribunal ("the Tribunal") decision that the respondent husband and wife, nationals of Bangladesh, were not persons to whom Australia had protection obligations.

The respondent husband claimed he had a well-founded fear of persecution because of his role as a political journalist for a newspaper and his membership to the Awami League. He claimed for the first time at the Tribunal hearing that there were false proceedings pending against him in Bangladesh. He stated that he did not mention this previously as he was unable to obtain any documents or proper evidence to support his claim. The Tribunal permitted him a week to provide documentary evidence but indicated that it would probably not accept the claim as credible as the respondent had not presented it consistently and did not provide any details. The Tribunal subsequently found the documents provided by the respondent were not genuine and his claim relating to the pending proceedings not credible. It found that the documents had been fabricated to enhance his protection visa application and rejected all claims of persecution.

The Minister contended that the Federal Magistrate had erred in concluding that the Tribunal committed jurisdictional error by failing to warn the respondent that it would reject the corroborative documents and therefore failed to accord the respondent procedural fairness and comply with s.422B(3) of the *Migration Act* 1958 ("the Act").

Held: *per curiam*, appeal allowed

- (i) The Tribunal's decision did not involve jurisdictional error as there was nothing unfair or unjust about the way in which the Tribunal acted in applying Division 4 of the Act.
- (ii) The Tribunal made it abundantly clear to the respondent that it did not believe the very late claim he was making. It was reluctant to give the respondent time to provide further material and made it abundantly clear that, even if documents were provided, the Tribunal may not accept them.
- (iii) There was not an issue for the purposes of s.425 as to the authenticity of the documents provided to the Tribunal. While there may have been an issue, raised by the respondent, as to whether there was a false charge brought against him in Bangladesh, the respondent was given ample opportunity to give evidence and present arguments relating to that issue and there was no failure to comply with s.425. Further the rejection by the Tribunal of the subsequently provided documents was not information within s.424A.
- (iv) Section 422B(3) may be understood as an exhortative provision in the same way as s.420(1) is an exhortative provision. Section 422B(3) speaks of how the Tribunal must act in applying Division 4. It is not a free standing obligation, but simply draws content from the other provisions of Division 4. It was not intended to qualify or cut down the express statement in s.422B(1).

MZXRE v MIAC

[2009] FCAFC 82

Federal Court of Australia, North, Graham & Rares JJ, VID 152 of 2009, 30 June 2009

This was an appeal from a judgment of the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that the appellant, a national of Malaysia, was not a person to whom Australia had protection obligations.

The Tribunal had previously made a decision that it lacked jurisdiction because the application for review was made outside the mandatory prescribed period. Prior to making that decision, the Tribunal had invited the appellant to a hearing at which the appellant gave evidence and presented arguments on the substantive issues. The Tribunal's first decision was remitted by the Federal Magistrates Court by consent

and the Tribunal was ordered to “rehear” the matter. Following the remittal, the Tribunal wrote to the appellant informing him that the case would be allocated to a new member and inviting him to provide any further material he wished the Tribunal to consider. The matter was, in fact, constituted to the same member, who again wrote to the appellant pursuant to s.424(2) of the *Migration Act* 1958 (the Act) inviting him to provide additional evidence. That letter was returned unclaimed and the Tribunal made its decision on the review. Prior to the handing down of that decision, the appellant submitted three media reports and a statutory declaration, in which he complained that he had not been invited to a hearing. The Tribunal considered that material but did not amend the written decision and proceeded to hand down the decision on the scheduled date.

The appellant contended, at first instance and on appeal that the Tribunal made jurisdictional errors by failing to invite him to a second hearing following the remittal, failing to reopen the review following the receipt of his statutory declaration and by appointing the same member to constitute the Tribunal following the remittal.

Held: *per curiam*, appeal dismissed

per curiam

- (i) When the appellant failed to respond to the Tribunal's invitation to provide further information pursuant to ss.424(2) & 424B, ss.424C(1), 425(2)(c) & 425(3) authorised the Tribunal to make a decision on the review without taking any further action (including inviting the appellant to a hearing). In the circumstances, albeit through no fault of the appellant, the Tribunal was authorised to proceed to make a decision as it did.
- (ii) It was not necessary for the Tribunal to be reconstituted. Whilst it would have been open to the Principal Member of the Tribunal to direct that another member constitute the Tribunal, it was not incumbent upon him to do so.

per North & Rares JJ

- (iii) The Tribunal's receipt of the statutory declaration did not necessarily require it to postpone or change its decision. The Tribunal had a discretion to reopen its procedures and permit the appellant a hearing. The Tribunal actually and properly had regard to the new material but found it was not persuaded to change its decision or reasons. In the absence of any indication from the appellant that he wished to say anything more, the Tribunal was entitled to form the view that it would not exercise its discretion to seek further information.
- (iv) The word “rehear” should not have been used in the consent orders. The word “rehear” in the consent orders could be taken to suggest that whatever had been down by the Tribunal has to be redone. That would not have been correct.

per Graham J

- (v) The appellant had no right to have his application for review determined by a different Tribunal Member.
- (vi) *Obiter*: Given the terms of the remittal order in this case and the terms of ss.414A(1)(b) & 414, a further invitation to the appellant under s.425(1) was required subject to s.425(2) & (3).
- (vii) The circumstances in which delay, of itself, will vitiate proceedings or a decision, are rare. The eight month delay between the hearing and the ultimate decision of the Tribunal in this case could not be described as unfair. There was an obvious explanation for the delay in this matter. The delay of eight of months was not so extreme that it should be inferred that there was a real and substantial risk that the Tribunal member's capacity to assess the appellant was impaired and a further invitation to appear before the Tribunal is not justified in the circumstances.

FEDERAL MAGISTRATES COURT JUDGMENTS

SZCLY v MIAC & Anor

[2009] FMCA 569

Federal Magistrates Court of Australia, Barnes FM, SYG 1337 of 2008, 26 June 2009

The applicant, a national of Tanzania, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that he was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of his political opinion as a member and activist in the Civic United Front (the CUF), a political party opposing the inclusion of Zanzibar in Tanzania. The applicant also claimed to be suffering from depression due to the lengthy separation from his family and his inability to support them. Two previous decisions of the Tribunal (T1 and T2) had been set aside by consent. The application for judicial review was in respect of the third Tribunal's decision (T3).

T3 accepted that the applicant may fear harm returning to Zanzibar (and Tanzania) because of the current government and because of his support of the CUF. The Tribunal also acknowledged that there may be a risk of psychological harm if he were to return to Zanzibar in light of past events. However, the Tribunal went on to find, in light of independent country information, that it was reasonably open for him to relocate, without his family, to a part of Tanzania without fear of harm for reason of his political activities. T3 also relied upon information that T1 one had obtained from a third party over the telephone, and put to the applicant under s.424A for comment.

The applicant contended, among other things, that T3 misconstrued and misapplied the proper test relating to relocation by failing to consider the practical realities of what might reasonably be expected of him if he relocated to the mainland of Tanzania. The applicant also contended that the failure by T1 to comply with s.424(3) of the *Migration Act* 1958 (the Act) by inviting additional information via telephone also resulted in non-compliance with s.424(3) by T3 as it relied upon information obtained as a result of that invitation.

Held: RRT decision quashed and remitted for reconsideration

- (i) The Tribunal fell into error in that it did not give proper consideration to the practical realities facing the applicant with respect to his family circumstances and psychological condition should he seek to relocate within Tanzania. This amounted to an error of law going to an essential task of the Tribunal, being the determination of whether the applicant's fear of persecution was 'well founded' in the Convention sense.
- (ii) There was material before the Tribunal relevant to the practical realities of relocation, such as employment, family, accommodation and psychological problems of the applicant that had to be considered. The summary way in which the Tribunal apparently dismissed the relevance of these factors and its failure to explore with the applicant the significance of his references to his family indicate that the Tribunal did not apply the right test when it concluded that it was satisfied that the applicant could reasonably relocate.
- (iii) Insofar as issues of the applicant's family and psychological condition were considered, they were considered as relevant to the risk of persecution, but not as they were or may have been relevant more generally to the 'reasonableness' of relocation and practical realities facing the applicant should he seek to relocate. It was necessary for the Tribunal to consider "what might reasonably be expected of the [applicant] with respect to his 'relocation'" in Tanzania (see *SZATV v MIAC & Anor* [2007] HCA 40).

Obiter:

- (iv) Consistent with *SZKTI v MIAC* [2008] FCAFC 83 there was a breach of s.424(3) constituting jurisdictional error by T1 when it invited a third party by telephone to confirm his identity and that he had sent earlier emails to the Tribunal. Importantly, however, the non-compliance by T1 was not the use of the information, but rather its failure to give the invitation in a manner prescribed. Even if the decision of T3 was affected by jurisdictional error merely because T1 gave an oral rather than a written invitation, and this had been the only basis on which jurisdictional error had been established, discretion to refuse relief would have been exercised.

SZNAV & Ors v MIAC & Anor

[2009] FMCA 693

Federal Magistrates Court of Australia, Raphael FM, SYG 3232 of 2008, 23 July 2009

The applicants, citizens of Bangladesh, sought judicial review of a decision of the Refugee Review Tribunal (the Tribunal) that they were not persons to whom Australia had protection obligations. The primary applicant, a Hindu man, claimed to fear persecution arising out of his marriage to his wife, a Muslim woman.

The Tribunal sent the applicants a letter acknowledging receipt of their application for review and explaining the review process (the acknowledgement letter). The acknowledgement letter stated, amongst other things, that the applicants should "immediately send us any documents, information or other evidence you want the Tribunal to consider." Eight days later, the Tribunal sent the applicants an invitation to appear for hearing, which advised them that the Tribunal had determined that it could not make a favourable decision on the information before it alone. The primary applicant attended the hearing at which he gave evidence and arguments on the issues arising in the review with the assistance of an interpreter. The Tribunal gave the applicants additional time to make further submissions following the conclusion of the hearing and further detailed submissions were provided by their migration agent.

The applicants contended that the Tribunal decision was affected by jurisdictional error because the acknowledgement letter contained an invitation to provide additional information under s.424(2) of the *Migration Act* 1958 (the Act) which failed to specify that the information was to be provided within the prescribed period in accordance with s.424B(2) of the Act. The Minister argued that s.424 was not enlivened because the acknowledgment letter was not written "*in conducting the review*" with a view to getting any information the Tribunal considered relevant.

Held: RRT decision quashed and remitted for reconsideration

- (i) The acknowledgement letter was a letter written pursuant to s.424 to which the provisions of s.424B(2) applied. By requiring the information 'immediately' instead of within 14 or 28 days, the writer did not require it to be given within the prescribed period and this caused a breach of s.424B(2). That breach caused unfairness to the applicant and constituted a jurisdictional error.
- (ii) Once an application is filed with the Tribunal, the Tribunal is seized of it and any thing that it does in relation to the application is done in "*conducting the review*". The acknowledgement letter invited the applicant to provide additional information (the original information being the information contained in the application to the Tribunal) for the purpose of considering whether or not the Tribunal would be prepared to make a decision in the applicant's favour without the necessity of inviting him to a hearing. The information thus had a particular importance, because the Tribunal might be prepared, on the basis of it, to grant a visa.
- (iii) Section 424 is the only source of power in the Act by which the Tribunal can obtain additional information by invitation from a person. The *obiter dicta* at [34] in *SZLTR v MIAC* [2008] FCA 1889 is not authority for the proposition that a request for additional information can be made other than in compliance with ss.359 or 424. Furthermore, the letter which was found in *MZXRE v MIAC* [2009] FCAFC 82 as not amounting to an invitation under s.424(2) can be distinguished because it invited the applicant to provide "documents" and "written arguments".
- (iv) The applicant was objectively disadvantaged by the Tribunal determining, before the prescribed period had expired, that it could not make a decision on the information provided alone and requiring a hearing. It could also be said that an applicant who was told he had to provide information "immediately" would not take any steps to provide information that he could not obtain in that short space of time and thus lose an opportunity of putting forward important evidence to the Tribunal.
- (v) As the Minister made no submissions upon discretion, the residual discretion to refuse relief will not be exercised.

SZNGL v MIAC & Anor

[2009] FMCA 583

Federal Magistrates Court of Australia, Nicholls FM, SYG 418 of 2009, 24 June 2009

The applicant, a national of China, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision that she was not a person to whom Australia had protection obligations. The applicant claimed to fear persecution on the basis of her practice of Falun Gong.

The applicant claimed she was a Falun Gong practitioner in China and that she continued her practice in Australia. The Tribunal found that the “dominant purpose” of the activities in Australia was to strengthen the applicant’s protection visa claims. The Tribunal concluded that it must disregard the applicant’s conduct in attending Falun Gong practice sessions in Australia pursuant to s.91R(3) of the *Migration Act 1958* (the Act).

The Court raised the issue of whether the Tribunal breached s.91R(3) of the Act, in particular, by having regard to the applicant’s conduct in Australia when assessing the credibility of her claim to have been a Falun Gong practitioner and, by its use of the word “dominant” when referring to the purpose for which she engaged in such conduct.

Held: RRT decision quashed and remitted for reconsideration

- (i) The Tribunal did not use the conduct in Australia in making an adverse credibility finding about the applicant. However the Tribunal misinterpreted and misapplied s.91R(3) by the use of the phrase “dominant purpose”.
- (ii) The Full Federal Court decision in *Somaghi v MIAC* (1991) 31 FCR 100 in relation to s.91R(3) requiring a “sole purpose” test is clearly binding on the Court. It is not open to the Court to accept or adopt the observations made about a “dominant purpose” test in *SZJZN v MIAC* [2008] FCA 519; *SZNAB v MIAC & Anor* [2009] FMCA 152.
- (iii) Pending the outcome of the appeal before the High Court from *MIAC v SZJGV* [2008] FCAFC 105, s.91R(3) requires the application of a sole purpose rather than a dominant purpose test in considering the applicant’s motives for engaging in conduct in Australia.

Wirya v MIAC & Anor

[2009] FMCA 590

Federal Magistrates Court of Australia, Raphael FM, SYG 3444 of 2008, 1 July 2009

The applicant sought judicial review of a Migration Review Tribunal (the Tribunal) decision affirming a decision of a delegate of the Minister to refuse to grant a Skilled – Independent Overseas Student (Residence) (Class DD) visa.

The delegate found the applicant achieved 110 points under the points test in Schedule 6A to the Migration Regulations 1994 (the Regulations) and as a result did not meet the qualifying score of 120 points for the purposes of cl.880.222 of Schedule 2 to the Regulations. The applicant claimed she was willing to invest at least \$100,000 in an approved Australian Government investment for a term of at least 12 months in order to qualify for 5 bonus points under Item 6A81 of Part 8 of Schedule 6A. However, as she was awarded 15 rather than 20 points for the English language component, the delegate concluded that the applicant did not meet the 115 point policy requirement to initiate a request for capital investment.

During her review application, the applicant provided evidence to the Tribunal of an IELTS English language test result that was sufficient for the award of 20 points. The Tribunal accepted this, but on the basis that the applicant had not made a deposit of \$100,000 in a designated security, it found that the applicant did not satisfy cl.880.222 as she did not have the qualifying score under the points test at the time of the Tribunal’s decision.

The applicant argued that the Tribunal’s decision was affected by jurisdictional error in that having been satisfied that the applicant achieved 115 points, it should have made an enquiry of the Department regarding its procedures in finalising cases involving the designated security issue. It was also contended that the Tribunal should have exercised its discretion under s.349(2)(c) of the Act to remit the matter to the

Department with a direction that the applicant satisfies the relevant criteria in the points test to achieve 115 points, and a recommendation to invite the applicant to deposit \$100 000 in a designated investment.

Held: MRT decision set aside and remitted for reconsideration

- (i) The Tribunal made a jurisdictional error by failing to make an enquiry of the Department that would have properly informed its exercise of discretion or the available choices of remedy. Material was clearly readily available and was centrally relevant to the decision made by the Tribunal in the sense outlined in *Prasad v Minister for Immigration* [1985] FCA 47. There was no material difference between the failure to enquire in this case and that considered in *Dhanoa v MIAC* [2009] FMCA 383.

Obiter

- (ii) It is not necessary to express a view on whether the Tribunal could remit with a recommendation that the application be held in abeyance because it was conceded by the Minister that it was permissible for the Tribunal to remit the matter under s.349(2)(c) with a finding that the applicant achieved 20 points under the language skill qualification.
- (iii) Had the Tribunal known of the Department's policy, it would have been required to at least consider whether it was appropriate for it to exercise its power under s.349 to remit the matter. A failure to do so would be acting so unreasonably as to fall into jurisdictional error; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 per Mason at [41].

LEGISLATION UPDATE

Legislative developments of relevance to the work of the Migration Review Tribunal and the Refugee Review Tribunal are noted below. The following Acts, Regulations and Instruments are accessible via the *Commonwealth Law of Australia* (COMLAW) website – <http://www.comlaw.gov.au>

Legislation Passed

ACTS

Migration Amendment (Protection of Identifying Information) Act 2009

An Act to amend the *Migration Act* 1958, in particular the definitions of 'disclosure' and 'identifying information' as they relate to obligations under Part 4A of the Migration Act. Date of Assent: 8 July 2009.

INSTRUMENTS

Migration Regulations 1994 – Specification under paragraphs 134.222C(2)(a), 139.226(b), 496.226(b), 863.226(b), 882.225(b), 6B34(a) and (b) and 6B101(f) and subparagraphs 475.214(b)(i) and (c)(i), 487.215(b)(i) and (c)(i), and 487.224(b)(i) and (c)(i) – States and Territories with English Language Training Arrangements (IMMI 09/072)

This Specification revokes the Migration Regulations 1994 – Specification under sub-regulations 134.222C(2)(a), 139.226(b), 475.214(b)(i), 475.214(c)(i), 487.215(b)(i), 487.215(c)(i), 487.224(b)(i), 487.224(c)(i), 496.226(b), 863.226(b), 882.225(b), 6B34(a), 6B34(b) and 6B101(f) – States and Territories with English Language Training Arrangements – August 2007. This Instrument commenced on 30 June 2009.

CASELOAD OVERVIEW

MRT Decisions – July 2009

Decision Category	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bridging refusal	3	4	1	1	9
Visitor refusal	35	16	1	7	59
Student refusal	16	17	12	9	54
Temporary business refusal	15	6	4	13	38
Permanent business refusal	8	4	0	0	12
Skill linked refusal	44	17	9	13	83
Partner refusal	56	11	11	2	80
Family refusal	13	16	0	4	33
Student cancellation	24	27	2	3	56
Sponsor approval refusal	3	1	3	1	8
Other	13	8	6	2	29
Total	230	127	49	55	461

RRT Decisions – July 2009

Country	Primary decision set aside	Primary decision affirmed	No jurisdiction Withdrawn	No jurisdiction Other	Total
Bahrain	1	1	0	0	2
Bangladesh	1	2	0	1	4
Cameroon	0	1	0	0	1
China (PRC)	23	59	1	1	84
Egypt	2	1	0	0	3
Fiji	0	5	0	1	6
Ghana	0	3	0	0	3
Guinea	0	1	0	0	1
Hungary	0	1	0	0	1
India	1	15	0	0	16
Indonesia	0	6	0	1	7
Iran	1	0	0	0	1
Iraq	0	1	0	0	1
Kenya	1	0	0	0	1
Korea, Republic Of	0	1	0	0	1
Lebanon	0	8	0	0	8

Macedonia, Fmr Yugo Rep of	0	1	0	0	1
Malaysia	1	10	1	1	13
Montenegro	0	1	0	0	1
Nigeria	1	1	0	0	2
Pakistan	1	5	0	0	6
Philippines	0	5	0	0	5
Samoa	0	1	0	0	1
Somalia	0	1	0	0	1
Sri Lanka	3	11	1	0	15
Sudan	1	0	0	0	1
Tonga	0	0	0	1	1
Turkey	0	3	0	0	3
Vietnam	0	1	0	1	2
Zambia	0	1	0	0	1
Zimbabwe	4	3	0	0	7
Total	41	149	3	7	200

PUBLICATION OF TRIBUNAL DECISIONS

The Migration Review Tribunal and Refugee Review Tribunal are required to publish decisions that are considered to be of 'particular interest'.

Decisions which are regarded as of particular interest are decisions: identified as representing a broad cross-section of decisions having regard to factors such as the visa subclass and the outcome of the review; or where there is detailed consideration of legal arguments or policy issues; or where the factual circumstances are complex or unusual or where there is or is likely to be significant external interest; or where there is clear precedential value. The Tribunals aim to publish at least 40% of decisions made.

The Refugee Review Tribunal has a statutory obligation to ensure that the published version of a decision statement must not contain any information which may identify the applicant or any relative or other dependent of the applicant. Decisions that require extensive editing to meet this obligation may not be published.

A selection of Tribunal decisions are available on the Migration Review Tribunal and Refugee Review Tribunal's website located at <http://www.mrt-rrt.gov.au/>.

The website also contains information about how to apply to the Tribunals, how the Tribunals are organised, the function of the Tribunals, caseload statistics, as well as copies of this and previous Bulletins.

The website is updated on a regular basis.

The Migration Review Tribunal and the Refugee Review Tribunal shall not be liable for any reliance by any person on the summaries contained in this Bulletin. Each summary provides a guide only to each decision and should not, under any circumstance, be used as a substitute for the full text of a decision.

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